THE ENGLISH CRIMINAL LAW AND BENEFIT OF CLERGY DURING THE EIGHTEENTH AND EARLY NINETEENTH CENTURIES[1]

More than three hundred years ago the "judicious" Hooker sagely observed that whoever undertook to maintain existing institutions had "to strive with a number of heavy prejudices deeply rooted in the hearts of men".[2] In our own day, when a feverish desire for innovation as well as a commendable zeal for reform are peculiarly rife, his warning would apply with added force to one who would venture to defend an obsolete institution. For some time our courts and judges have been under fire and our first reaction toward legal fictions in English law would be to scorn them as peculiarly noxious products of the lawyer's brain. Tested at their face value, warranties, recoveries, the bill of Middlesex, and the writ of *latitat* seem perverse and barren subtleties;[3] but, as a wise student of human culture has pointed out: "To ingenious attempts at explaining by the light of reason things which want the light of history to show their meaning, much of the learned nonsense of the world has indeed been due."[4]

Very generally legal fictions were devised as means of evading or modifying laws, which, obstructive or oppressive as they might be in particular cases, could not be repealed. Since the law could not be altered the facts were altered, though the fictions by which this was brought about never deceived nor were intended to deceive anybody.[5] "It must also be remembered", says Sir Frederick Pollock, "that the shifts and fictions which appeared to our fathers of the Reform Bill time roundabout, cumbrous, absurd, and barely honest, were introduced as a deliverance from things yet worse".[6]

[1] This paper, in substantially its present form, was read at the meeting of the American Historical Association in Cincinnati, December 29, 1916.

[2] Hooker, *Ecclesiastical Polity*, bk. I., ch. 1, sec. 1.

[3] *Cf.* McIlwain, *The High Court of Parliament and its Supremacy* (1910), pp. 265, 266.

[4] Tylor, *Primitive Culture* (1877), I. 19, 20.

[5] McIlwain, *op. cit.*, p. 265, citing Austin, *Lectures on Jurisprudence* (fourth ed.), II. 629.

[6] *Land Laws* (1883), p. 75; *cf.* also p. 66. Blackstone observes with reference to the same point "the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions and circuities in order to recover that equitable and substantial justice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman

In the case of the criminal code the evil was due to a series of sanguinary laws extending from the sixteenth through the eighteenth century and imposing the capital penalty on scores of minor offenses, particularly, various forms of stealing and arson. This barbarous legislation, which reached its apogee at the beginning of the nineteenth century, was due to the lawlessness which flourished rankly before the days of an organized police system, to the disregard of human life so widely prevalent before the awakening of the humanitarian spirit, and to the exalted notions regarding the sacredness of property held by the privileged classes who then dominated Parliament. The mischief of over-minutely regulative legislation, once manifest in the English criminal code, is only too apparent in other fields of governmental activity in our modern democracies.[7]

The method by which the judges came to soften the rigor of the old penal code was largely by means of the fiction of benefit of clergy and various transparent distortions of fact by which they and the juries made it apply. Blackstone,[8] commenting on the status of the institution in his time, remarks:

> In this state does the benefit of clergy at present stand, very considerably different from its original institution: the wisdom of the English legislature, having in the course of a long and laborious process, extracted, by a noble alchemy, rich medicine out of poisonous ingredients, and converted by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics into a merciful mitigation of the general law with respect to capital punishments.

It is true that the later development of benefit of clergy owed much to legislative enactment; but Blackstone in his touching admiration of the British constitution fails to emphasize the fact that Parliament in its unwisdom, by a succession of eighteenth-century statutes excluding hosts of felonies from benefit of clergy, took away with one hand what it gave with the other, so that, had it not been for the wise and merciful discretion of those who administered the laws, the situation would have been intolerable. Many of the old judges were callous enough in all conscience, some, no doubt, were corrupt, the devices which they had to employ were crude, awkward, and intricate,[9] furthermore, they played havoc with facts;

jurisprudence." *Commentaries on the English Constitution,* IV. 418. The references to Blackstone are to the original edition, the pagination of which is usually to be found in the margins of those issued by subsequent editors.

[7] *Cf. e. g.,* Pollock, *Land Laws,* pp. 149–150.

[8] *Commentaries,* IV. 372.

[9] Sir James Fitzjames Stephen, *History of the Criminal Law of England* (1883), I. 458.

but an actual examination of the court records would seem to indicate that they are deserving of more credit than they have received from historians.

Lecky tells us that "the penal code was not only atrociously sanguinary and constantly aggravated by the addition of new offenses; it was also executed in a manner peculiarly fitted to brutalize the people".[10] He inveighs against "the atrocity and almost grotesque absurdity" of a system whereby the same crimes might, by a haphazard multiplicity of statutes, be prosecuted under totally different penalties, while in addition they remained offenses at the common law.[11]

> A natural result of such laws [he argues][12] was the constant perjury of juries. Unwilling to convict culprits for small offenses which were made punishable by death, they frequently acquitted in the face of the clearest evidence; and, as witnesses in these cases were very reluctant to appear, criminals—among whom the gambling spirit is strongly developed—generally preferred to be tried for a capital offense rather than for a misdemeanor. Often, too, juries, when unwilling to acquit, reduced the offense by most barefaced perjury to the rank of a misdemeanor.[13] Thus, several cases are recorded in which prisoners, indicted for stealing from dwelling houses were convicted only of larceny, by the jury finding that the value of what they had stolen was less than 40 shillings, even when several guineas in gold, or bank notes to a considerable amount, were among the booty that was taken. The proportion of arrested men who were discharged on account of prosecutors and witnesses failing to appear against them,[14] or acquitted on account of the reluctance of juries to condemn, or of the legal rule that the smallest technical flaw invalidated the indictment was enormously great. . . . In one year, from April 1793 to March 1794, 1060 persons were tried at the Old Bailey and of these only 493 were punished.[15]

[10] Lecky, *History of England in the Eighteenth Century* (cab. ed., 1904), II. 134.

[11] *Ibid.*, VII. 314–317. *Cf.* Burn, *The Justice of the Peace* (twenty-third ed., 1820), I. xxv, citing Hawkins, *Pleas of the Crown*, I., c. 28, sec. 18: "Wherever a statute makes any offense felony, it incidentally gives it all the properties of felony at the Common Law." *Cf.* also Burn, III. 191, citing the opinion of Bayley, J., in Rex *v.* Johnson.

[12] As an example of the lack of discrimination in penalties he instances (VII. 317, note 1) the case of two persons whipped round Covent Garden in 1772, one for stealing a bunch of radishes, one "for debauching and polluting his own niece". *Ibid.*, citing *Annual Register* (1772), p. 116.

[13] This was more properly a clergyable felony.

[14] Sir Walter Besant, *London in the Eighteenth Century* (1902), points out that the citizens were "afraid of giving evidence", that they were "terrorised into silence" by the numbers and organizations of the criminal class that infested the city (pp. 502, 504, citing Henry Fielding, *An Enquiry into the Causes of the late Increase of Robberies*, etc., 1751).

[15] Lecky, *England*, VII. 317–319. Thus the percentage of convictions for the year selected was 46. An examination of the *Old Bailey Sessions Papers* indicates

While many of those sentenced to death had their sentence commuted, usually to transportation, the number of executions was scandalously large.[16] Lecky's conclusion is that the very ferocity of the code and the consequent uncertainty in enforcing it "also deprived secondary punishment of deterrent effect, for the imaginations of men were naturally much more impressed by the escape of a criminal from the gallows than by the fate which subsequently awaited him". This was the attitude taken by Romilly, Mackintosh, and Peel, who wrought such a wonderful reform in the English criminal code; yet it was also accepted as a general principle by Blackstone notwithstanding his general devotion to the existing system.[17]

Meantime, before the efforts of the reformers had borne fruit, crime had begun to increase with startling rapidity. In 1805, 4605 were committed for trial, 2783 were convicted, of whom 350 were sentenced to death, and 68 executed. In 1810, 5146 were committed, 3158 convicted, 476 sentenced to death, and 67 executed. In 1815 there were 7818 committed, 4883 convicted, 553 sentenced to death, and 57 executed. In 1819, 14,254 were committed, 9510 convicted, 1314 sentenced to death, and 108 executed. Sir Spencer Walpole, who cites these statistics,[18] draws two conclusions there-

that the percentage of convictions often ran to 60 and occasionally even higher. See below, p. 560.

[16] For figures see Lecky, VII. 317–319, citing Howard, *State of Prisons,* pp. 479–485, and *Annual Register,* 1785, p. 247.

[17] He cites with approval the opinion of Montesquieu (*Spirit of the Laws,* bk. VI., ch. 13) "that crimes are more effectually prevented by the *certainty,* than by the *severity* of punishment", and also the statute 1 Mary, st. 1, c. 1, which declares in its preamble "that laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept, than laws made with 'extreme punishments'". Blackstone then proceeds to argue that "a multitude of sanguinary laws . . . prove a manifest defect either in the wisdom of the legislative, or in the strength of the executive power". Referring to the 160 crimes punishable by death without benefit of clergy, he remarks: "So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer: he boldly engages in some desperate attempt to relieve his wants or supply his vices." At the same time, he points out a consideration which will be developed later, namely that, "besides the additional terrors of a speedy execution and a subsequent exposure or dissection, robbers have a hope of transportation, which seldom is extended to murderers", which has the effect of "preventing frequent assassinations". *Commentaries,* IV. 17, 18, 19.

[18] *History of England since 1815* (cab. ed., 1907), I. 167, 168.

from: first, "the extraordinary increase in the amount of crime; the second, the uncertainty of detecting it. Out of every 100 persons who were committed for trial, 33 had a reasonable prospect of acquittal; out of every hundred persons who were sentenced to death, 92 were not executed." It would appear, however, that upwards of 70 per cent. of convictions would indicate a considerable certainty of punishment, in view of the number of persons brought to trial on insufficient evidence.

Another of Sir Spencer Walpole's conclusions must be questioned. He states that, "all felonies, except sacrilege and horse-stealing, were, up to 1827, felonies with benefit of clergy, provided the same were not expressly excepted by statute. But, as in practice they always were excepted, the law was a mere mockery."[19] To be sure, Sir James Mackintosh stated that in 1819 there were "no less than 200 felonies punishable with death"—and this no doubt meant without benefit of clergy—an increase of forty since Blackstone wrote. As a matter of fact, as Walpole himself admits, there were only twenty-five offenses for which anyone had suffered death during three-quarters of a century.[20] Only those accused of certain of the graver crimes were in jeopardy of their lives, while, in other cases, the juries, instructed it would seem by the judges, would render verdicts which brought the offense within benefit of clergy.[21] So, while benefit of clergy may have been a mockery according to the letter of the law, it was far from such in practical application, as will be seen later.

Walpole further asserts that "the severity of the penal code acted as a direct encouragement to the criminal", and that "juries declined to convict an unfortunate individual of a trifling offence, when conviction might entail the loss of the offender's life; and prisoners were consequently acquitted, not because they were innocent, but because the punishment assignable to the offence was, in the opinion of the country, too severe".[22] This again is not in accordance with the facts, for, while the juries, by a recognized prac-

[19] *History of England since 1815*, I. 168, note 2.

[20] *Ibid.*, II. 138.

[21] *Cf.*, for example, the 57 executed in 1819: murder and attempted murder 16; burglary 10; forgery 11; robbery from the person 7; rape 7; sheep-stealing 3; arson 1; horse-stealing 1; unnatural offense 1. *Ibid.*, I. 167, note 1, citing *Metropolitan Police Report* (1828), p. 286. On the other hand, from 1805 to 1817, 655 persons had been indicted for stealing 5 *s* from a shop; 113 had been sentenced to death, "but the sentence had not been carried into effect on a single offender". *Ibid.*, II. 135. Here again Walpole conveys an erroneous impression by omitting to state that in most cases the accused instead of being acquitted suffered some lighter punishment.

[22] *Ibid.*, I. 169.

tice which Lecky termed "barefaced perjury" and Blackstone "pious perjury", evaded imposing the extreme penalties of the law, they did not acquit in the majority of cases. While emphasizing these points it is still possible heartily to agree that the laws were a horrible anomaly and that they needed sorely to be brought "into accord with the practice".

Long before Lecky or Walpole wrote, the commissioners appointed to inquire into the state of the criminal law and to suggest reforms had taken the attitude generally adopted by subsequent writers.[23]

> If it were understood [so they report] that the minor degrees of those offenses which are now capital would ordinarily be visited with the utmost severity of the law, it would be difficult, by reason of the sentiments of the various parties concerned in the administration of justice, to procure convictions of guilty persons. Accordingly, whilst the law annexes the punishment of death to several extensive classes of offenses, that punishment is and can be executed only on a few only of the more atrocious offenders by way of example. . . . A hungry pauper, for example, who after it is dark breaks a pane of glass, and thrusts his hand through the broken window to seize a loaf of bread is just as liable to suffer death, as a gang of ruffians who break into a dwelling house to pillage the inhabitants, and who execute their purpose with circumstances of the utmost violence and cruelty. Since then, the punishment of death cannot be invariably executed in all cases where it is annexed by law to the crime, the question arises whether it is of use in those cases where it is so annexed but not actually inflicted.[24]

Here again, there is a failure to distinguish between the letter of the law and the way in which it was administered; almost invariably in the case of a needy first offender a verdict would be rendered making the theft a clergyable felony, and, while the accused was usually punished, he ran little or no chance of losing his life.[25]

The commissioners, the contemporary reformers, and practically

[23] See Commissioners on the Criminal Law, *Reports* 1 to 8 (London, 1834–1845, 3 vols., fol.).

[24] *Criminal Law Report,* II. 19. Compare also, p. 23, and Walpole, *England since 1815,* II. 133, 134.

[25] The commissioners apparently recognize this fact when they refer to "the nearest approach to a general rule guiding the practice of selection in burglary and robbery: when the offense is accompanied with great personal violence the offenders are not infrequently punished with death. But even here the practice is varying and uncertain." *Report,* II. 25. Richard Burn in his invaluable work, *The Justice of the Peace* (III. 204), has an apposite passage: "It is said by Mr. Dalton and others that it is no felony for one reduced to extreme necessity to take so much of another's victuals as will save him from starving; but this can never be admitted as a legal defense in a country like this. . . . Yet still in apportioning the punishment, the court will have a tender regard to cases of real necessity, which may and do exist sometimes under the best regulated governments."

all the writers who have followed them in dealing with the subject have argued that the inordinate number of capital penalties, which were rarely imposed except in extreme cases, was a direct encouragement to criminals. A careful study of the situation, however, would seem to indicate that the sanguinary laws were a symptom rather than a cause. The startling prevalence of crime was due to a complex of causes. Doubtless the lack of an effective police system was a leading factor. The London constables and watchmen were generally inept, often corrupt, and not infrequently both. Timid folk did not dare to appear as prosecutors, fearing subsequent vengeance from desperate criminals.[26] Peel saw to the bottom of this and accompanied his reform of the criminal code by the establishment of the metropolitan police in 1829, an institution which was gradually extended throughout the country. A second factor to be taken into account is the absence of adequate lighting facilities, notably in London where the dark, crooked streets and alleys offered tempting lurking-places for thieves and robbers. Then, thirdly, the appalling increase in the consumption of spirits, particularly gin, played a prominent and sinister rôle in the sordid drama.[27] Fourthly, the degrading and brutalizing sports, such as bull-baiting, cock-fighting, prize-fighting, as well as the public executions, which were regarded in the light of recreations, have also to be taken into account. Fifthly, the absence of any comprehensive provision for public education was a factor of no inconsiderable importance. Finally, the distressing increase of crime to be noted in the last decade of the eighteenth century[28] and first four decades of the nineteenth was due largely to the real misery produced by the Great French War and the painful readjustment necessitated by the Industrial Revolution—the introduction of machinery and factories and the influx into towns incapable of absorbing at once large increases of population. With the advent of better times about the middle of the last century crime began steadily to decrease.[29]

[26] For a brief account of informers see Besant, *London in the Eighteenth Century*, p. 513 ff.

[27] For the increase of gin-drinking and the futile efforts to check it see Lecky, *England*, II. 98 ff.; Lord Mahon (Earl Stanhope), *History of England, 1713–1783* (fourth ed., 1853–1854), II. 282 ff.; III. 212 ff. The consumption of gin increased from 527,000 gallons in 1684 to 5,394,000 in 1735, and to nearly 11,000,000 in 1750.

[28] For figures see above, p. 547.

[29] In 1819 there was one committal in every 1000; in 1842 one in 500; in 1845 one in 750; in 1869 one in 1000. Walpole, *England*, V. 57, 152. The committals rose from 4346 in 1806 to 31,309 in 1842 and then, in spite of a rapidly increasing population, dropped to 18,326 in 1861. *Ibid.*, VI. 387. Curiously enough, Sir Spencer Walpole, while he recognizes many of the above causes in fostering crime, does not apply them to modify his conclusions with regard to the

Hovering over the administration of the criminal law in the late eighteenth and early nineteenth century was the ghost of benefit of clergy, strangely transformed from its original shape. Although described in more or less detail by various legal writers,[30] it will be necessary to sketch briefly the chequered career of this venerable institution. Benefit of clergy, or *privilegium clericale,* consisted originally in the right of the clergy, in the graver crimes which came to be known as felonies, to be exempt from the jurisdiction of the secular courts and to be subject only to the church courts.[31] This claim, which apparently dates from very early times, was first clearly recognized in England in Stephen's charter of 1136.[32] The refusal of Henry II. to recognize the privilege of exemption in the case of criminous clerks was the chief cause for the famous struggle with Becket. In an agreement made with the papal legate in 1176 the king finally agreed that "in criminal cases, for the future, no clerk should be brought in person before a secular judge except for some offense against the forest laws or in respect of some service due by reason of feudal tenure".[33] The accused clerk was claimed by the ordinary, as the bishop's representative was called, and held in prison until called upon to purge himself in the court Christian, which he did with the aid of twelve compurgators or oath helpers.[34]

old criminal code. For a discussion of the prevalence of crime in the eighteenth century see Besant, *London,* p. 502 ff.

[30] Among them are: Sir Matthew Hale, *History of the Pleas of the Crown* (1786), II. 323–390; William Hawkins, *Treatise of Pleas of the Crown* (1721), II. 337–366; Chitty, *A Treatise on Crown Law* (1816), I. 666–690; Blackstone, *Commentaries,* IV. 365–374; Burn, *Justice of the Peace,* I. 498–503; *Encyclopaedia of the Laws of England* (London, 1897–1898), II. 59–61; Pollock and Maitland, *English Law,* I. 441–457; Felix Makower, *Constitutional History and Constitution of the Church of England* (1895), pp. 399–415; Pike, *A History of Crime in England* (1873–1876), I. 104–105, 116, 212, 298–303, 314; II. 280–282, 454–455; Pike, *Constitutional History of the House of Lords,* pp. 261–263; Stephen, *Criminal Law,* I. 457–478; *Middlesex County Records* (n. d.), I. xxxiii–xlix.

[31] It is said that their claim was based on the text: "Touch not mine anointed and do my prophets no harm." I Chronicles, xvi. 22, and Psalms, cv. 15. Blackstone, *Commentaries,* IV. 365.

[32] Makower, *Church of England,* p. 399.

[33] *Ibid.,* p. 402; Pollock and Maitland, I. 447, note 1. The privilege was confirmed in the so-called *articuli cleri,* 9 Edw. II., st. 1, c. 15, which provides that "a clerk ought not to be judged before a Temporal Judge, nor anything may be done against him that concerneth Life or Member".

[34] Stephen, *Criminal Law,* I. 459, 460, citing Bracton, states that in the latter's day the clerk had to be handed over at once, but Pollock and Maitland show (I. 442) that before the end of the reign of Henry III. a preliminary inquest might be held in the lay court. If found innocent the accused was released. If found guilty his land and goods were forfeited before he was handed over to the ecclesiastical court. In later times his chattels only were forfeited, see Burn, *Justice of the Peace,* II. 442, citing Hale, *Crown Pleas,* II. 388, 389, and III. 215, citing East, *Pleas of the Crown,* II. 736, 737.

In the rare event of his failing to clear himself he was punished with degradation from orders, relegation to a monastery, whipping or branding, for the Church could not shed blood.[35]

Originally benefit of clergy was confined to regularly ordained clerks and monks (*i. e.,* those who had *habitum et tonsuram clericalem*) but in 1350 an ordinance for the clergy (*i. e., pro clero*)[36] included within the scope of the privilege "all manner of clerks as well secular as religious". This was apparently interpreted to mean all who could read; at any rate such grew to be the usage of the courts.[37] A verse in the Psalter was commonly selected (usually the 51st Psalm) which came to be known as the "neck-verse", and if the accused was able to "read like a clerk" he was handed over to the ordinary, though it was an indictable offense at common law to teach a felon to read that he might claim his clergy. By the reign of Henry VI. it became the settled practice of the courts that no one could claim the privilege until after his trial in the secular tribunal.[38] While this was aimed at the Church's claims of exemption, the advantage was obvious; for the accused always stood a chance of being acquitted.

With the spread of education abuses naturally arose, and in 1487[39] it was enacted that, "whereas upon trust of privilege of the Church, divers persons lettered hath been the more bold to commit murder, rape, robbery, theft and all other mischievous deeds" every person not being within orders who shall once be admitted to the benefit of clergy, shall, if convicted of murder, be branded with an M on the brawn of his left thumb, for any other felony with a T, by the gaoler "openly in the court in the presence of the judge before being delivered to the ordinary". Such persons were henceforth forbidden to claim any benefit of clergy, while clerks actually in orders were still entitled to the privilege as often as they offended.[40] By 1 Edw. VI., c. 12, s. 10 ff., it was enacted that:

[35] Pollock and Maitland, I. 445.

[36] 25 Edw. III., st. 6, c. 4. This was confirmed by 4 Hen. IV., c. 2 (1402).

[37] However, one judge as late as 1352 held that tonsure was necessary for a successful assertion of benefit of clergy, though the ordinary was willing to go further. Pike, *History of Crime,* I. 300. *Cf.* Makower, *Church of England,* p. 403, note 32. One curious exception was the exclusion of a *bigamus,* by 4 Edw. I., c. 5 (1276) and 18 Edw. III., c. 2 (1344). This did not mean a bigamist in our sense, but a man who married twice or married a widow. The restriction was done away with by 1 Edw. VI., c. 12, s. 16. Stephen, *Criminal Law,* I. 461.

[38] *Ibid.,* I. 460; Makower, p. 405; Pike, *House of Lords,* p. 261, is apparently incorrect in stating the contrary.

[39] 4 Hen. VII., c. 13.

[40] Those actually in holy orders were not branded. Burn, *Justice of the Peace,* I. 498, citing Hale, *Pleas of the Crown,* II. 374, 375, 389. By two statutes

In any case in which any of the King's subjects might have benefit of clergy, as well as in addition for the crimes of house-breaking, highway robbery, horse-stealing, and robbing of churches, any Peer or Lord of Parliament was, upon claim made, to be held as a clerk convict who might make purgation . . . "though he cannot read, without any burning in the hand, loss of inheritance, or corruption of his blood."[41]

In an age when the cultivation of letters was still regarded as an ungentlemanly pursuit there were some no doubt to whom the concession in the matter of reading was vital.[42] Readers of *Henry Esmond* will recall how Lord Mohun pleaded his clergy after he had killed Lord Castlewood in a duel. As a matter of fact, Lords Mohun and Warwick claimed the privilege when they were tried before the House of Lords for the murder of Richard Coote, October 30, 1698.[43] Lord Byron—from whom his grandnephew, the poet, inherited the title—who killed Viscount Chaworth in a tavern scuffle and who was convicted of manslaughter by his peers, April 16, 1765, escaped death by virtue of his privilege.[44] As in the case of lay commoners, a peer could claim his clergy only once.

The proceedings in the episcopal court were usually a sham, a "blasphemous farce". The culprit, generally after he had pleaded guilty or been convicted before a secular tribunal, swore his oath that he was innocent, the twelve compurgators whom he selected nonchalantly supported him in his perjury, the judge connived at the practice, and an acquittal usually followed. The only excuse for this solemn mockery was the "barbarously simple penal code" and the fact that, in the case of laymen at least, it was confined to first offenders.[45] A great step in advance came in the reign of Elizabeth when it was enacted[46] that any person admitted to benefit of clergy should no longer be delivered to the ordinary but discharged by the

of the reign of Henry VIII. (28 H. VIII., c. 1, s. 7, and 32 H. VIII., c. 3, s. 8) it was provided that those in holy orders should be burnt like laymen and likewise have their privilege only once, but by 1 Edw. VI., c. 12, s. 13, they were restored to their old immunity. By 10 and 11 Will. III., c. 23, burning "in the most visible part of the check nearest the nose" was substituted for the thumb; but, by 5 Anne, c. 6, the old practice was resumed and continued till branding was done away with in 1779.

41 Pike, *House of Lords*, p. 262.

42 It was in the reign of Henry VIII. that one noble lord declared: "By the body of God, I would sooner see my son hanged than a bookworm. It is a gentleman's calling to be able to blow the horn, to hunt and hawk. He should leave learning to clodhoppers." *Letters and Papers of the Reign of Henry VIII.*, vol. II., pt. 2, no. 3765.

43 Howell, *State Trials*, XIII. 939–1060.

44 *Ibid.*, XIX. 1177.

45 *Middlesex County Records*, I. xxxvi, xxxvii.

46 18 Eliz., c. 7, s. 2, 3.

justices, who might, nevertheless, imprison him for any period not exceeding a year.[47] Branding, later as an alternative, continued in use until late in the eighteenth century. Many will remember in *Peveril of the Peak* the remark of the warden of Newgate to Julian Peveril: "Ten to one it will turn out chance medley or manslaughter and then it is but a singed thumb instead of a twisted neck."

A full record survives of the celebrated case of Ben Jonson. He was imprisoned and indicted, September 22, 1598, for slaying one Gabriel Spencer in a duel at Shoreditch. Tried at the Old Bailey in October he pleaded guilty, claimed his clergy, read the neck-verse, and was branded.[48] Another case relating to an obscure man throws a flood of light on the actual working of the system. It is to be found in a petition to the House of Lords, dated 1640, from Osmund Gibbs, yeoman, for relief against John Farwell, a councillor at law and justice of the peace in the county of Somerset, who "having cast a greedy eye upon petitioner's copyhold, endeavoured to become owner thereof by most unconscionable practices". Among other things he indicted him at the assizes

> upon a false charge of stealing a tame buck, and procured witnesses to swear that petitioner confessed having stolen it. He was found guilty and put to read for his life. Petitioner desired to read the Psalm of Mercy, but Farwell so incensed the judge against him, that there was not only a clear bar made to prevent promptings, but the judge turned him unto one of the hardest verses to read, which by God's grace he was enabled to do, and so escaped hanging, but was burnt in the hand.[49]

In the reign of William and Mary benefit of clergy was extended to women.[50] Doubtless this influenced the judges in the case of the notorious Duchess of Kingston who was tried for bigamy in 1776 and claimed her privilege. Although they are not expressly named

[47] Pike points out a glaring injustice which the law allowed. "Imprisonment . . . did not apply to Peers, whose trial by the Peers in cases of felony was saved to them by the Act of Edward VI. [1 Edw. VI., c. 12, s. 15]; and a Peer who could or who could not read might still have robbed one church or committed one highway robbery with impunity, though an ignorant peasant would have been hanged." *House of Lords*, p. 263.

[48] *Middlesex County Records*, I. xxxviii–xlii.

[49] Hist. MSS. Comm., *Report* IV., pt. I., p. 37. A later instance will be found in a letter from John Charlton to Lady Granby, November 11, 1703. "You wish to hear", he writes, "an account of Lady Herbert finding her jewels . . . All I know is that one who was her coachman took them from her. She found all in his possession except two diamonds and these she got again from one that had bought them for very little. She found her jewels, tried the man and had him burned in the cheek [see above, p. 553], all in three days." *Ibid.*, XII., app. pt. V., *Rutland Papers*, II. 177.

[50] 3 W. and Mary, c. 9; *cf.* 21 Jas. I., c. 6. By 4 and 5 Will. III., c. 24, s. 13, it was provided that they should have the privilege but once.

in 1 Edw. VI., c. 12, it was decided that peeresses convicted of clergyable felony should be discharged for the first offense without burning or imprisonment.[51]

As reading ceased to be the monopoly of the clergy, the mischievousness of the exemption came to be more and more pronounced. Sir James Stephen, writing in 1883, remarked: "It is difficult, if not impossible, to say how this system worked in practice. No statistics as to either convictions or executions were kept then, or till long afterwards."[52] However, John Cordy Jeaffreson, the learned editor of the *Middlesex County Records,* the first volume of which was published in 1886, while working from professedly incomplete data, has compiled some figures which give at least an approximate idea of the relative number of persons who claimed their clergy in the late sixteenth and early seventeenth centuries in the county of Middlesex. In the last four years of the reign of Edward VI., 8.54 per cent. out of 117 convicted of capital offenses could read and pleaded their clergy: in the reign of James I. there was an amazing increase to 38.83 per cent. out of 1725 cases. One wishes that Jeaffreson could have carried his computations to the beginning of the eighteenth century when the reading test was abolished. During the reign of James a legal fiction was beginning which was one of a number extensively employed in the following century, namely, the practice of convicting of petty larceny those indicted for grand larceny;[53] out of 1616 persons acquitted of capital felony 21.96 per cent. were convicted of petty larceny on evidence of grand larceny.[54]

At length Parliament came to realize the rank injustice of discriminating between lettered and unlettered criminals, so in the reign of Anne the reading test was taken away, and it was provided that henceforth if any person convicted of a clergyable felony "shall pray to have the benefit of this act he shall not be required to read, but without any reading shall be allowed, taken and reported to be and punished as a clerk convict."[55] At the same time, the judges were given another discretionary punishment—sentence to the house

[51] Thomas Leach, *Cases in Crown Law* (third ed., 1800), I. 173. Blackstone, *Commentaries,* IV. 367. Howell, *State Trials,* XX. 355 ff.

[52] *History of Criminal Law,* I. 467.

[53] Grand larceny was "a felonious and fraudulent taking and carrying away by any person of the mere personal goods of another above the value of 12 *d.* Burn, *Justice of the Peace,* I. x.

[54] *Middlesex County Records,* II. xxxix, 239–314.

[55] 6 Anne, c. 9, s. 4. So it is at least in the *Statutes of the Realm,* the standard edition published by the Record Commission, though the statute is usually cited as 5 Anne, c. 6.

of correction from six months to two years. According to Chitty:

> The usual form of granting the benefit of clergy is, for the clerk to ask the prisoner what he has to say why judgment of death should not be pronounced upon him, and then to desire him to fall on his knees, and pray the benefit of the statute; which he does, and the court grants it to him without delay. . . . But it cannot be doubted, that if the prisoner should obstinately refuse to pray it, the court would *ex debito justitiae* allow it.[56]

For a first offense, then, in the case of felonies, any man or woman could, after 1705, claim benefit of clergy unless the offense was expressly declared non-clergyable by statute.[57] Although the first offender thus escaped death he was branded and liable to imprisonment for one year or to confinement in the workhouse for a period not exceeding two years. The number of felonies at common law was but small. Up to the passage of 6 Anne, c. 9 I have counted about twenty-five statutable felonies involving the death penalty without benefit of clergy. Those who are curious may read them in the statutes cited in the subjoined foot-note,[58] and Stephen[59] enumerates the principal ones. Grouped under general heads the offenses made non-clergyable by these various statutes were: petty treason,[60] piracy, murder, arson, burglary, housebreaking and putting in fear, highway robbery, horse-stealing, stealing from the person above the value of a shilling, rape, and abduction with the intent to marry.

After the abolition of the reading test, various alternatives to

[56] *Criminal Law,* I. 687. It was the opinion of Hawkins, *Pleas of the Crown,* II. 359, that "if the prisoner does not demand it, it seems to be left to the discretion of the judge, whether he will allow it him or not". It came to be so much a matter of course in the eighteenth century that it is only recorded in the *Old Bailey Sessions Papers* in a few exceptional cases.

[57] "All felonies by the common law have the benefit of clergy, therefore where a statute enacts a felony, and says the offender shall *suffer* death, clergy lies notwithstanding, and is never ousted without express words." Coke, *Third Institute,* p. 732, cited by Burn, *Justice of the Peace,* I. xxvi.

[58] 3 Hen. VII., c. 2 (*cf.* 39 Eliz., c. 9, and 1 Geo. IV., c. 15); 12 Hen. VII., c. 7; 4 Hen. VIII., c. 2; 22 Hen. VIII (*cf.* 6 Geo. II., c. 37, s. 5, and 42 Geo. III., c. 32); 23 Hen. VIII., c. 1, ss. 3, 4 (*cf.* 1 Edw. VI., c. 12, s. 10, and 12 Anne, c. 7); 25 Hen. VIII., cc. 6, 15 (*cf.* 1 Mary, st. 1, c. 1, s. 3, and 5 Eliz., c. 17); 32 Hen. VIII., c. 3; 4 and 5 Ph. and M., c. 4; 1 Edw. VI., c. 12, ss. 9, 10; 2 and 3 Edw. VI., cc. 29, 33; 5 and 6 Edw. VI., cc. 9, 10; 5 Eliz., c. 16; 8 Eliz., c. 4; 39 Eliz., c. 15; 43 Eliz., c. 13; 1 Jas. I., cc. 1, 8; 18 Chas. II., c. 3; 22 Chas. II., cc. 1, 5; 3 W. and M., c. 9 (*cf.* 6 and 7 Will. III., c. 14, s. 1); 10 and 11 Will. III., c. 12 (*cf.* 1 Geo. IV., c. 117); 1 Anne, st. 2, c. 9. Burn, *Justice of the Peace,* who has the various offenses grouped under alphabetical heads, *e. g.,* larceny, is of invaluable assistance in using the statutes.

[59] *Criminal Law,* I. 465–467.

[60] High treason, as was seen above, had always been excluded from benefit of clergy.

branding, imprisonment, or the workhouse were provided for those to whom clergy was allowed. Thus by the statutes 4 Geo. I., c. 11, and 6 Geo. I., c. 23, it was enacted that where any persons have been convicted of grand and petty larceny or any form of stealing within clergy, the court in their discretion, instead of burning in the hand or whipping,[61] may direct such offenders to be transported to America. This punishment might also be applied to those convicted of non-clergyable felonies to whom the king might be pleased to issue a conditional pardon.[62] In all cases, however, it was provided that convicts who returned or who were found at large before the expiration of their term should be guilty of felony without benefit of the clergy.[63] The statute 19 Geo. III. provided in lieu of transportation to America "any parts beyond the seas".

Transportation, first tried during the Restoration period, was not generally employed till 1718. From that date until the outbreak of the American Revolution it continued to be the commonest substitute for the death penalty, imprisonment being ordinarily reserved for those held for trial, and for debtors. In view of the horrible conditions prevailing in the prisons, transportation was, from the standpoint of the culprits, a happy substitute. After the American colonies were closed to English convicts, the jails proving inadequate, those formerly sent beyond the seas were set to work on the navigation of the Thames or confined in convict hulks.[64] In 1787 a penal colony was established at Botany Bay and transportation to Australia continued for seventy years. At first the convicts were useful in developing the resources of the new country, but the system gradually became intolerable and it was eventually abandoned in 1857.[65]

Thus, while after the abolition of the reading test any first offender might, in the case of a clergyable felony, escape the death

61 Since peers were not liable to be burnt in the hand their privilege remained unaffected by such acts as 4 and 6 Geo. I. Pike, *House of Lords*, p. 263.

62 See Blackstone, *Commentaries*, IV. 371. *Cf.* 56 Geo. II., c. 27, offenders convicted of crimes excluded from clergy, to whom the king shall extend mercy on condition of transportation beyond the seas, may be ordered to be transported according to such conditions.

63 6 Geo. I., c. 23; 16 Geo. II., c. 15; 8 Geo. III., c. 15.

64 This is provided for by 19 Geo. III., c. 74. There are a number of sentences "to the navigation" in the *Old Bailey Sessions Papers* during the later seventies.

65 Meantime, 53 Geo. III., c. 162, provided for imprisonment at hard labor, simply and alone, or in conjunction with other penalties, and 56 Geo. III., c. 63, enacts that convicts sentenced to transportation may be confined in the general penitentiary at Millbank. For transportation see Lecky, *England*, VII. 325–327, and Walpole, *England*, I. 170–171; IV. 410–415; VI. 350, 370–375.

penalty, there was ample provision for his punishment, branding,[66] whipping, imprisonment, confinement in the workhouse, transportation, employment on the navigation, and forfeiture. Not infrequently more than one of these penalties was imposed. Moreover, the fact that so many of those sentenced to death escaped execution ceases to be so striking when it is remembered that numbers were pardoned conditionally, which meant transportation.[67]

Judged by the statutes alone, the offender's chances of escaping death grew darker and darker during the century which followed the abolition of the reading test; for in that very period when Parliament was providing alternative penalties for clergyable felonies it was passing scores of acts creating felonies without benefit of clergy. An actual study of the statutes and of Burn's invaluable *Justice of the Peace*—where offenses are arranged under alphabetical heads

[66] Wife-murderers where there were extenuating circumstances were very generally convicted of manslaughter and branded, the usual penalty for any form of the latter offense. One curious case is that of John Wright, who was sentenced to be branded for wounding his wife after she had "abused him very much in language". (*Old Bailey Sessions Papers,* no. 373, July, 1749.) Finally, however, by 19 Geo. III., c. 74, it was enacted that instead of branding the court might, in all clergyable felonies, impose a fine or (except in the case of manslaughter) order the offender to be publicly or privately whipped. As in the case of branding, the offender so fined or whipped might be liable to subsequent imprisonment. With the passage of this act branding practically ceased. However, by 3 Geo. IV., c. 38, s. 1, after reciting that the punishment of burning in the hand had long been deemed ineffective and inexpedient, it was further enacted that persons convicted of manslaughter might be transported and imprisoned for three years or fined, at the discretion of the court.

[67] According to the following letter, written by George III., in 1776, the king regarded the issuing of pardons as a serious matter. He writes: "My dear Lord, I hope you are too well acquainted with the feelings of my heart to doubt in the least the pleasure I feel, when I can with propriety save the life of any miserable wretch, but I must not let myself from sensations that ought ever to reside in the breast of man, to fall into a most improper evil, the preventing the execution of the laws without some real ground for the interposition of the most agreeable feather of the prerogative of the Crown. Burglaries daily encrease, they are the most alarming of all robberies; these, and highway robberies call at present very strongly for a very exact execution of the laws, and the sending a reprieve within a couple of hours of the time of execution is never done but on some strong appearance of some new point from whence perhaps the innocence of the prisoner can be presumed. I therefore must decline preventing the law to take its course." Hist. MSS. Comm., *Rept.* XI., pt. V., *Dartmouth MSS.*, p. 441. This contradicts the statement of Besant, *London,* p. 505. "Conditional pardons were recognized by . . . (31 Chas. 2, c. 2, ss. 13, 14), and used to be granted by the king through the Secretary of State upon the recommendation of the Judges of Assize . . . it was enacted in 1768 (8 Geo. 3, c. 15) in substance that Judges of Assize should have power to order persons convicted of crimes without the benefit of clergy to be transported for any term they thought proper, or for fourteen years if no term was specially mentioned." Stephen, *Criminal Law,* I. 471.

such as arson, forgery, larceny, riot, smuggling, and so on—will show that neither Blackstone nor Mackintosh exaggerated when they stated that there were 160 and 200 capital non-clergyable felonies in 1769 and 1819 respectively. On the other hand, Stephen has observed very wisely

> that the number of capital offenses on the statute book is no test of its severity. A few general enactments may be much more severe than a great number of special ones. A general enactment that grand larceny should be excluded from benefit of clergy would have been infinitely more severe than fifty acts excluding the stealing of fifty sorts of things from benefit of clergy. . . . Moreover, the 160 offenses mentioned by Blackstone might probably be reduced by careful classification to a comparatively small number.

As an instance Stephen cites the celebrated Black Act of 1722 (9 Geo. I., c. 27) which "creates fifty-four capital offences, for it forbids three classes of persons to do any one of eighteen acts".[68] Assuming the number of offenses to be eighteen and proceeding equally conservatively in other cases I have counted 148 capital non-clergyable felonies created by statute during the eighteenth and early nineteenth centuries. Adding the twenty-five in existence before 1705, the number is not far from that estimated by Mackintosh. Among them are fourteen kinds of arson, thirty-five specified forgeries, eighteen offenses relating to stealing or destroying linen cloth or yarn, silk, wool or woollen cloth, or the machinery used in their manufacture, and five having to do with threatening letters.[69] Some were called forth by very special circumstances, for example an act of 9 Anne making an attempt on the life of a privy councillor in the execution of his office a felony without clergy, and another (56 Geo. III., c. 22) enacting the same offense for persons rescuing or aiding in the escape of Bonaparte. So much for the code.

In order to see how it worked in actual practice I have examined in considerable detail the records of oyer and terminer and gaol deliveries at the Old Bailey. Selecting more or less at random—in order to avoid prejudice—during the century from 1729 when the fine set of *Old Bailey Sessions Papers* in the Harvard Law School Library begins, I have presented at least one year's cases in each decade. The result is shown in the following table.[70]

[68] *Ibid.*, pp. 470, 471. The act is treated in detail by Burn, *Justice of the Peace*, I. 297–298.

[69] Burn requires more than fifty pages to treat in full all the statutes relating to larceny. *Justice of the Peace*, II. 175–228.

[70] There were eight sessions of the court each year, from December to October.

	Tried	Sentenced to death	Transported	Branded	Whipped	Imprisoned	Navigation	Fined	Pilloried	Per cent. convicted
1729–1730	541	48	219	29	24	4		(4)[71]	(3)	60+
1730–1731	501	51	271	28	21	5		(5)	(2)	74
1731–1732	554	70	209	7	6	6		(6)	(2)	55
1732–1733	559	52	248	26	4	9		(6)	(2)	61
1748–1749	670	61	255	21	61					59+
1749–1750	670	84	258	17	36	2(7)		(1)	(2)	59+
1760–1761	284[72]	22	155	21	17	3(1)		(1)	(2)	76
1769–1770	704	89	266	27	25	1(2)				58
1778–1779	517	56		60[73]	49	12[74]	45[75]	14		57
1802–1803	846	88	203		99	10(75)		3		59−

The average number convicted in the years included in the above table was 62 per cent. In 1818–1819, 1548 were tried at the Old Bailey Sessions, of whom 1094 were convicted or 70 per cent. Taking the statistics of trials and convictions cited above, page 547, which by the way, apply to the whole of England and not merely to the London central criminal court at the Old Bailey—the percentages for 1805, 1810, 1815, and 1819 respectively are 60, 61, 63, 66. The conclusions to be drawn from these figures are that there was a very fair average of convictions, and that, as crime begins to increase in the early years of the nineteenth century, the percentage of convictions tends to increase rather than to diminish.

The *Old Bailey Sessions Papers* show that a goodly proportion of the acquittals was from a genuine insufficiency of evidence, not infrequently where drunken night prowlers, usually sailors or men of fashion, accuse women of the town of stealing their money and valuables. The grossest cases of acquittal in the teeth of evidence seem to be those of men accused of committing rape upon children. Horse, cattle, and sheep stealers[76] were generally sentenced to death

[71] Numbers in parentheses indicate more than one punishment, *e. g.*, fine and imprisonment.

[72] The small number of those tried in this year was due to the war. Many convicts were enlisted in the army and navy.

[73] In this year branding practically ceased; see above, p. 558.

[74] Many of those branded and whipped were also imprisoned.

[75] After the outbreak of the American Revolution this form of punishment came to be employed.

[76] For example, John Collison and George Aldridge were sentenced to death for stealing a gelding and a mare. *Old Bailey Sessions Papers*, September, 1749, nos. 498, 499. While horse-stealing had been a non-clergyable felony since 1 Edw. VI., c. 12 (*cf.* 2 and 3 Edw. VI., c. 33), cattle and sheep stealing were not included in the same category till 14 Geo. II., c. 6, and 15 Geo. II., c. 34. A letter from Sir Thomas Parker, C.J., to the Earl of Dartmouth gives a statement of the case of William Partridge, "and is of opinion that he is not a proper subject of mercy". Partridge had formerly committed a felony and had been burnt in the hand. Since then he and another had made it their business to

with scant consideration, and so were forgers, for there was no way of bringing them within clergy, though they were sometimes acquitted on a technicality.[77] Highway robbers almost invariably got their just deserts,[78] while considerable leniency was shown to those charged with housebreaking and larceny from the person. The law on the subject was as follows. Burglary, which consisted in breaking and entering a dwelling-house by night with felonious intent, was, by the common law, a clergyable felony. However, by 1 Edw. VI., c. 12, and 18 Eliz., c. 7, clergy was taken away from the principals and, by 3 and 4 W. and M., c. 9, from abettors and accessories before the fact. Other statutes took away clergy from stealing or larceny of the following amounts: over 12 pence from a dwelling-house, even in the daytime, if there was breaking and if any person was therein; without breaking if any person was therein and put in fear, 3 and 4 W. and M., c. 9; over 5 shillings, for breaking any dwelling-house, out-house, shop, or warehouse in the daytime although no person was therein, 39 Eliz., c. 15, privately stealing from any shop, by day or night, even if the same was not broken into and even if no person was therein, 10 and 11 Will. III.,

steal cows in Essex and sell them in Hertfordshire, for which they were now convicted. Hist. MSS. Comm., *Rept.* XI., pt. V., *Dartmouth MSS.*, p. 316. Stephen remarks, *Criminal Law,* I. 469, note 3: "it is curious that pigs have never met with any special recognition or protection from the law"; but, in the case of one Sara Chapple pigs were included within the meaning of the Black Act. Burn, *Justice of the Peace,* I. 447.

[77] In the case of Rex *v.* Judd, who was committed for setting fire to a parcel of unthreshed wheat, the court were of the opinion that, "as the statute only made it felony to set fire to a cock, mow, or stack of corn, the commitment did not charge the defendant with a felony; and he was therefore committed to bail", Burn, I. 416. *The London Times* (weekly ed.), April 21, 1916, p. 302, cites two cases from the Southampton quarter sessions; one, an inquisition for murder (1827), was quashed because it stated "the jury on their oath present" instead of "oaths"; in the other, a man charged with stealing a brace of partridges from the rack of a railway carriage got off because the partridges were not described as dead! There was some reason, however, for this second ruling. "Larceny cannot be committed of such animals in which there is no property either absolute or qualified, as of beasts that are *ferae naturae* and unreclaimed, such as . . . wild fowls at their natural liberty. But if they are reclaimed or confined, and may serve for food, it is otherwise . . . larceny may be committed." Blackstone, *Commentaries,* IV. 235. See, also, Burn, *Justice of the Peace,* II. 209.

[78] There were however rare exceptions, *e. g.,* James Slade and William Cane, indicted for assaulting and robbing Joseph Steel of a hat valued at 3 *s.* (*Old Bailey Sessions Papers,* January, 1748, nos. 99, 100), and Abraham Mopps, indicted with three other persons not found for an assault on Samuel Lee on the king's highway and stealing one silk handkerchief, a steel watch, and two steel seals (*ibid.,* July, 1748, no. 371). In each case they were found guilty of the felony but not of robbery, but they were not exaggerated cases. Cane, and apparently the others, were transported.

c. 23; over 40 shillings, from a dwelling-house, although there was no breaking and no person therein, 12 Anne, st. 1, c. 7. Privately stealing from the person, unaccompanied by violence, was a non-capital felony, provided the amount was under 12 pence, carrying with it the common law penalty of whipping or, by 4 Geo. I., c. 11, transportation. The sum was absurdly small and dates from ancient times when coined money was scarce and went a long way.[79]

A few actual examples might be cited to see how the juries—obviously instructed by the judges, for they could not of themselves have known the intricacies of the law—dealt with the cases before them. In December, 1730, Stephen Gay was tried for breaking the house of William Roberts in the night and taking a bag, value one penny, a gold ring, a moidore, 11 guineas and 35 shillings in money, the property of John Bonny. The verdict was "guilty of felony but not of burglary". There may have been doubt as to the breaking or whether the offense was committed in the night-time; but it was clear that the property was worth over 40 shillings so that, according to law, he was liable to death without benefit of clergy.[80] Another case is that of John Hatt, indicted for breaking and entering the residence of the Countess of Pembroke and stealing goods valued at £3 9*s*. The verdict was guilty of 39 shillings, not breaking the house, and Hatt was transported seven years.[81] In such a case there might be a profound difference of opinion between a jury and the owner as to the value of the second-hand garments stolen. As a rule, however, as in the case just preceding, there was little doubt that the valuation at 39 shillings was made in flat contradiction of the facts to bring the offender within his clergy.[82] The assumption was too transparent to call it perjury.

In some cases there is a curious discrimination in sentences: for example, John Nicholas and Edward Hammond were indicted for entering the dwelling-house of Robert Russel and stealing out thence two pewter dishes, value 5 shillings, six plates, value 3 shillings, one pewter cullinder, value 6 pence, one gallon pot, value 2

79 Blackstone, *Commentaries,* IV. 239 ff., discusses these laws in some detail.

80 *Old Bailey Sessions Papers,* December, 1730. In the earlier volumes the cases are not numbered.

81 *Ibid.,* June, 1748, no. 105.

82 *Cf.* the following cases, Thomas Griffice, indicted for breaking the dwelling-house of Joseph Taper and stealing one cloth coat, value 50 *s.*, one guinea and 21 *s.* in money, guilty of felony 39 *s.* but acquitted of the burglary, transported for seven years. *Ibid.,* January, 1748, no. 154. Benjamin MacMahone, a painter, stole gold ornaments, etc., value £10 and upward, from Diana West, daughter of Lord Delaware, from his dwelling-house. The accused asked to be transported. Lord Delaware agreed. He was found guilty, 39 *s.* *Ibid.,* December, 1749, no. 2.

shillings, two quart pots, value 1 shilling, and other things, his property. Both were found "guilty of felony only"; but Nicholas was burnt in the hand while Hammond was transported for seven years.[83] In this and many other instances the absence of the ground for discrimination may be due to the meagreness of the report. John Phillips, tried for stealing clothes estimated to be worth 61 shillings, was declared by the jury to have stolen 4 shillings 10 pence and so escaped death, whereas if the property had been admitted to be worth 5 shillings the offense would have been non-clergyable.[84] On the other hand, Thomas Beck was sentenced to death for stealing one handkerchief valued at 1 shilling and a cap, 8 pence.[85] This was grand larceny, and Beck, too, was very likely an old offender. There are numberless instances where the value of property usually taken from the person was estimated at 10 pence to bring the offense under the head of petty larceny.[86]

Many sentences where the culprit escaped death were peculiarly heavy, for example Edward Evans and George Potts were transported for seven years for stealing a pound and a quarter of ginger valued at 12 pence.[87] There are some quaint cases, for example William Lawrence was sentenced to death for enlisting John Davidson, alias David Birk, a six-foot man, for the service of the King of Prussia.[88] Frederick William's passion for tall grenadiers was very trying to various European countries. Another is that of John Leminghau, spelt Lemingham in the index, who was indicted for stealing from a book-shop a *Collection of all the Statutes now in Use,* value 4 shillings. His father, a Russian imperial chaplain who had left him in England to pursue his education, must have been

[83] *Ibid.*, January, 1749, nos. 125, 136, and index. In the January sessions, 1748, there are two cases where persons stealing silver tankards valued at £7 and £8 respectively were found guilty of felony, the former culprit being burnt in the hand, the latter transported for seven years (*ibid.*, nos. 121, 133, and index), while in the following February one John Raven, possibly not a first offender, though it does not appear in the record, was sentenced to death for the theft of a tankard valued at £5 (*ibid.*, no. 162).

[84] *Ibid.*, January, 1748, no. 92; *cf.* the case of Susannah Bailey, indicted for stealing seven linen caps, value 2 *s.*, two muslin handkerchiefs, value 3 *s.*, one pair of linen sleeves, value 3 *s.*, two muslin stocks, six linen shirts, one linen shift, three towels, one flannel petticoat, the goods of John Smith in the dwelling of the said John Smith, guilty, 4*s.* 10 *d.*, *ibid.*, September, 1749, no. 507.

[85] *Ibid.*, February, 1732.

[86] *E. g.*, Richard Jones, indicted for stealing a live dove and a bird cage, value 1 *s.*, guilty 10 *d.* and transported for seven years, *ibid.*, January, 1748, no. 111, and Hannah Wilmot, indicted for stealing goods of the estimated value of 21 *s.*, verdict 10 *d.*, sentence, whipping, *ibid.*, no. 141.

[87] *Ibid.*, October, 1749, nos. 617, 618.

[88] *Ibid.*, April, 1738.

astounded at his son's zeal for learning. Sir J. F. Barrie rewarded John Shand with a wife and a parliamentary career for a somewhat similar offense; but poor Leminghau was privately whipped.[89]

We are fortunate in having a fairly complete record of a man who successfully pleaded his clergy once and was caught in an attempt to plead it a second time. In the *Old Bailey Sessions Papers* for September, 1749, Robert Davie and Richard Parker, lightermen, were indicted for stealing nine elephant's teeth weighing 450 pounds and valued at £40. Both were found guilty, but judgment was respited, and in the October sessions,

> Davie was brought to the bar and asked what he had to say for himself. He desired that he might have benefit of clergy. He was told by the court that he had had it once before, and that there was a statute-law in this realm which forbids a person to have it a second time. To prove which, the record of his conviction was read for stealing, 30 April, in the twelfth year of his present Majesty (1739), sixty pounds weight of tobacco, value 40 shillings . . . tried at Justice Hall in the Old Bailey, Wednesday, 2 May, brought in guilty, 4s 10d, and that he then prayed for the benefit in such case made and provided, therefore he was transported for the term of seven years, this being a clergyable felony. Now on the testimony of witnesses who testified against his denial that he was the same person the jury found the issue for the King, that the prisoner was the same person. Accordingly he was sentenced to death.[90]

Eventually, the persistent efforts of Sir Samuel Romilly and Sir James Mackintosh to reform the bloodthirsty criminal code prevailed. Sir Robert Peel, before he resigned the office of Home Secretary in November, 1830, had reduced the number of capital penalties to about a score. As a consequence, benefit of clergy, which had practically served its turn in mitigating the terrors of the law, was done away with in 1827,[91] with the provision, however, "that no one convicted of felony should suffer death unless for felonies excluded from benefit of clergy, or made punishable by

[89] "There was a messenger came from the Russian Ambassador to assure the court that if his crime would admit of corporal punishment the Ambassador would order him a safe passage to Russia." *Old Bailey Sessions Papers,* January, 1749, no. 148.

[90] *Ibid.,* nos. 577, 661.

[91] 7 and 8 Geo. IV., c. 28, s. 6. As no reference was made to the act of Edw. VI. conferring the privilege on Lords of Parliament and Peers, there was doubt whether that remained. When Lord Cardigan—subsequently famous as the leader of the charge of the Light Brigade—was tried for felony in 1841 because of a duel with Captain Tuckett, it was alleged that he was to claim the benefit. Consequently, the statute was repealed (4 and 5 Vict., c. 22) and it was further enacted "that every Lord of Parliament or Peer against whom an indictment for felony might be found, should plead to it, and should, upon conviction, be liable to the same punishment as any other of Her Majesty's subjects". Pike, *House of Lords,* p. 263; Walpole, *England,* IV. 437–439.

death by some statute subsequently passed". Proper substitute punishments were provided.[92] By successive acts, passed at intervals during the next generation, capital penalties were steadily reduced, until after the consolidation acts of 1861,[93] the only offenses punishable by death were four, *i. e.,* treason, murder, piracy with violence, and setting fire to arsenals and dockyards.[94]

Sir James Fitzjames Stephen, for reasons worthy of serious consideration, expresses the opinion that "we have gone too far" in laying aside the punishment of death, and "that it ought to be inflicted in many cases not at present capital".[95] Be that as it may, no one would now defend the old barbarous system.[96] Nevertheless, in spite of ferocious laws and a certain number of capricious and disproportionate sentences, a fair degree of substantial justice was administered in the courts. Those who escaped capital punishment, if the evidence proved them guilty, were reasonably certain to receive some lighter sentence, and the prevalence and increase of crime was due in all probability to other causes than the excessive rigor of the code. That the system proved as workable as it did was due in no small degree to ingenious applications of that queer old exemption, benefit of clergy, so strangely distorted from its original purpose.

ARTHUR LYON CROSS.

92 Stephen, *Criminal Law,* I. 472, and ss. 7 and 9 of the act.

93 24 and 25 Vict., ss. 96–100.

94 Stephen, *Criminal Law,* I. 473–475.

95 *Ibid.,* I. 478.

96 For the arguments of Paley and Eldon to the contrary see Lecky, *England,* VII. 321, and Walpole, *England,* I. 169.